MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-292

THE SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES OF AMERICA AND CANADA, A RELIGIOUS BODY, ET AL.,

Petitioners,

vs.

DIONISIJE MILIVOJEVICH, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

MOTION OF THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

And

BRIEF FOR THE CATHOLIC BISHOP OF CHICAGO AS AMICUS CURIAE.

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NOW COMES THE CATHOLIC BISHOP OF CHICAGO, a corporation sole, by his undersigned attorneys, and respectfully applies for leave to file a brief as *amicus curiae* in the above-captioned case pursuant to Rule 42(3), and in support of his application, states:

1. The nature of the applicant's interest in the cause is described in the Affidavit that is attached hereto and made a part hereof as Exhibit "A."

2. As set forth in the Affidavit, the Catholic Bishop of Chicago leads the largest Roman Catholic Archdiocese in the United States. The Archdiocese is part of the Roman Catholic Church which is hierarchical in nature.

3. This case dealing with resolution of disputes in hierarchical churches, will have a lasting effect on their First Amendment rights. The Catholic Bishop of Chicago believes that an *amicus* brief on his behalf will illuminate the issues in this case as they relate to the Roman Catholic Church and will thus be of significant aid to the Court in considering and deciding the case before it.

4. Forty printed copies of the proposed *amicus* brief of the Catholic Bishop of Chicago are being lodged with the Clerk contemporaneously with this Motion.

Respectfully submitted,

DON H. REUBEN,
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Attorneys for the Catholic Bishop of Chicago, a corporation sole.

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(312) 861-2000.

EXHIBIT A.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

AFFIDAVIT.

REVEREND MONSIGNOR FRANCIS A. BRACKIN, *M.A., S.T.L.*, being first duly sworn on oath, deposes and says:

1. He is a priest and Vicar General of the Roman Catholic Archdiocese of Chicago. As such, he assists in the administration of the Archdiocese and is familiar with its structure and organization.

2. The Roman Catholic Archdiocese of Chicago is the largest Roman Catholic Archdiocese in the United States. It encompasses Cook and Lake Counties, Illinois, and is organized as a corporation by a special act of the Illinois Legislature. The legal title of the corporation is: the Catholic Bishop of Chicago, a corporation sole. The Catholic Bishop of Chicago is the spiritual leader of 2,466,294 Catholics.

3. The Archdiocese of Chicago is part of the Roman Catholic Church which is hierarchical in nature. It shares an identical faith and doctrine with other Catholic churches throughout the world and all these churches look to the Pope in Rome as their ultimate earthly authority.

4. The Catholic Bishop of Chicago administers the Archdiocese both directly and through a number of boards and tribunals which are quasi-legislative or quasi-judicial in character. The Catholic Bishop is in turn subject to higher ecclesiastical authorities in the Church. These authorities also include quasi-legislative and quasi-judicial bodies.

5. The decisions of ecclesiastical authorities may be based on written norms such as the Code of Canon Law or unwritten traditions. These decisions may also have spiritual bases which cannot be readily verbalized or codified.

6. If the decisions of ecclesiastical authorities with respect to Church matters were made the subject of the same searching judicial review exhibited by the Illinois Supreme Court in this case, there would be a far-reaching adverse impact on the religious activities of hierarchical churches:

(a) Church administration would be disrupted and administrative action could be delayed for months or years;

(b) Church authorities would have to expend substantial resources defending their decisions in civil courts; and

(c) Church decisions would be guided increasingly by the civil law norms rather than ecclesiastical norms so that they could pass muster in the civil courts.

7. The Catholic Bishop is vitally interested in this case because of the broad application it may have to litigation relating to hierarchical churches. The Catholic Bishop believes that an *amicus* brief will be of significant assistance to the Court in considering and determining the issues presented.

8. The Catholic Bishop's counsel has requested the written consent of the parties to this litigation to file a brief *amicus curiae*, and such consent was not granted.

/s/ REVEREND MONSIGNOR FRANCIS A. BRACKIN, *M.A., S.T.L.*

REVEREND MONSIGNOR FRANCIS A. BRACKIN, *M.A., S.T.L.*

Subscribed and Sworn to before me this ninth day of December, 1975.

/s/ DOLORES FIGIEL,
Notary Public.

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MAY IT PLEASE THE COURT:

PRELIMINARY STATEMENT.

The Catholic Bishop of Chicago, a corporation sole, respectfully submits this brief *amicus curiae;* his interest is set forth in the Affidavit of Monsignor Francis A. Brackin, M.A., S.T.L., Vicar General of the Roman Catholic Archdiocese of Chicago, which is attached to the Catholic Bishop's motion for leave to file this brief. The Affidavit is incorporated herein by reference.

This Court has long recognized that to preserve religious freedom it is necessary that civil courts accept as conclusive the decisions of the highest ecclesiastical authorities of a hierarchical church in ecclesiastical disputes. *Watson* v. *Jones,* 80 U.S. (13

Wall.) 679 (1871); *Gonzales* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Kreshik* v. *St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 U.S. 190 (1960); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). The decision of the Illinois Supreme Court in the instant case is a sharp departure from these precedents. It establishes civil courts as courts of review over decision making bodies of hierarchical churches and imposes civil law standards as tests against which ecclesiastical decisions must be measured. If left unchecked, this approach to the resolution of disputes within hierarchical churches would displace Church authority for resolving ecclesiastical disputes with civil authority, and ecclesiastical standards, with civil standards. The tragic result would be the gradual secularization of churches and their decision making bodies. We respectfully submit that this Court should act to correct the Illinois Supreme Court's departure from long established precedent and thus protect vital First Amendment rights.

ARGUMENT.

I. The "Arbitrariness" Exception to the Conclusiveness Rule Should Be Limited or Abandoned.

This Court has consistently held that civil courts must accept as conclusive the decisions of the highest authorities in a hierarchical Church regarding ecclesiastical disputes. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra;* and the other authorities cited above. Although this Court has indicated in *dicta* that the rule would not apply where ecclesiastical decisions resulted from "fraud, collusion, or arbitrariness," it has never used any portion of this exception to invalidate an ecclesiastical decision. *Gonzales* v. *Roman Catholic Archbishop*, 280 U.S. at 16. Moreover, this

Court has explained, that civil courts were limited to the "narrowest kind of review" of ecclesiastical decisions; and that this review must be one that "does not inject the civil courts into substantive ecclesiastical matters." *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. at 451.

In the present case, there is no question but that the Serbian Eastern Orthodox Church is hierarchical and that the decisions of its tribunals should be binding on the civil courts. *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Dionisije Milivojevich*, 60 Ill.2d 477, 501, 328 N.E.2d 268, 280 (1975):

> "Plaintiffs argue and defendant Bishop Dionisije does not dispute that the Serbian Orthodox Church is a hierarchical and episcopal church. Moreover, the parties agree that in cases involving hierarchical churches the decisions of the proper church tribunals on questions of discipline, faith or ecclesiastical rule, though affecting civil rights, are accepted as conclusive in disputes before the civil courts."

Nonetheless, the Illinois Supreme Court, conducted a detailed review of proceedings of the Serbian Eastern Orthodox Church pursuant to the "arbitrariness" exception. As a result of this review, the Court held that "Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of Serbian Orthodox Church;" and that: ". . . the division of the American-Canadian Diocese into three new dioceses by the Holy Assembly was 'in clear and palpable excess of its own jurisdiction,' and as such, it is not binding on civil courts." 60 Ill.2d at 503, 507, 328 N.E.2d at 281, 284.

This expansive application of the "arbitrariness" exception goes far beyond the "narrowest kind of review" referred to in *Blue Hull*. Indeed, the Illinois Supreme Court's review was at least tantamount to application of the "clearly erroneous" standard used for court review of the decisions of administrative agencies, if not the "against manifest weight of the evidence"

standard used for review of evidentiary determinations made by courts of first instance. Moreover, it certainly went beyond the practice of federal courts sitting in diversity jurisdiction to accept as conclusive the highest state court's interpretation of its law. *Erie R. R.* v. *Tompkins,* 304 U.S. 64 (1938); *Comer* v. *Texaco,* 514 F.2d 1243 (5th Cir. 1975). Whatever scope this Court ultimately delineates for court review of ecclesiastical decisions, surely that scope must be more limited than civil courts' review of government agency decisions or the factual findings and legal conclusions of other civil courts.

Not only did the Illinois Supreme Court conduct an excessive review of the Serbian Eastern Orthodox Church's proceedings, it also substituted itself as the final arbiter of its norms. This substitution is apparent in its critical review of the Church's proceedings and especially in its utter disregard for the Church's position that the defrocked Bishop's defiance of Church authority was highly relevant to any Church decisions made about him. 60 Ill. 2d at 503, 328 N.E.2d at 281. This disregard for ecclesiastical norms is the most pernicious aspect of the Illinois Supreme Court's decision and is pregnant with hazards for religious practice in hierarchical churches.

As was noted in the Affidavit of Monsignor Francis A. Brackin, certain norms for ecclesiastical decisions are written and codified, others are oral traditions and still others may be spiritual and beyond man's capacity for verbalization. This amalgam of principles, traditions, perspective and inspiration make up the character and stamp of a particular church or religion. When civil courts decide Church disputes and disregard Church norms, they inevitably alter the Church's character. This process would be accelerated as churches tailored their operations so that their decisions could survive in civil courts. Moreover, the power to review ecclesiastical decisions and criticize ecclesiastical norms is really the power to establish state religions by the gradual transformation of existing churches. Thus, whatever standards this Court may establish for review of Church decisions, those standards must protect against civil courts' altering ecclesiastical norms.

The Illinois Supreme Court begs the questions inherent in civil courts' tampering with ecclesiastical norms by asserting that it has resolved the issues before it without becoming entangled in the determination of theological or doctrinal matters. 60 Ill. 2d 505, 328 N.E.2d at 282. The fact of the matter is that theological norms are often so enmeshed with temporal norms that theological and temporal issues cannot be even defined, much less resolved independently of one another. More pertinently, the selection of a bishop and the reorganization of a diocese are plainly "substantive ecclesiastical matters." *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra.* This Court has held that the governmental sector must maintain absolute neutrality with respect to Church decisions on Church matters. *Walz* v. *Tax Commission,* 397 U.S. 664 (1970). The Illinois Supreme Court's overruling the Serbian Eastern Orthodox Church's decisions on the selection of a bishop and the reorganization of a diocese insinuates the state into the most sensitive of ecclesiastical matters. The Religion Clauses cannot permit the state to exercise veto power over the appointment of Church hierarchy and the reorganization of Church administration.

Apart from the foregoing, sweeping Court review of ecclesiastical decisions would seriously disrupt and delay the routine operations of Church tribunals and decision making bodies. In addition, it would require churches to divert substantial resources from their religious activities to the defense of their ecclesiastical decisions in the courts.

In sum, the cumulative impact of extensive court review of ecclesiastical decisions would constitute a two-fold violation of the Religion Clauses. It would impede churches from carrying out their religious activities and it would facilitate civil courts in establishing a state religion. We respectfully submit that this Court should avert these departures from First Amendment prec-

edents by abandoning the "arbitrariness" exception or at least by defining it in such a way as to preclude the broad review engaged in by the Illinois Supreme Court. If this Court chooses the latter course, it should require that the decisions of hierarchical churches with respect to Church matters be left undisturbed unless they are demonstrated to be clearly outside the ambit of the Church's authority.

CONCLUSION.

We respectfully submit that the Illinois Supreme Court's review of the decisions of the Serbian Eastern Orthodox Church violates the Religion Clauses of the First Amendment to the United States Constitution. We further submit that this Court should abandon the "arbitrariness" exception to the rule that civil courts must accept as final the decisions of hierarchical churches with respect to ecclesiastical disputes. In the alternative, this Court should require that the decisions of hierarchical churches be left undisturbed unless demonstrated to be clearly outside the ambit of the Church's authority.

Respectfully submitted,

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December 9, 1975.